Quek Chek Yen v District Council, Kulai

HIGH COURT (JOHORE BAHRU) — ORIGINATING SUMMONS NO 31-1015 OF 1987
ABU MANSOR J
27 APRIL 1989

Labour Law — Pension rights — Circular in 1975 back-dated to 1970 to provide for pension — Services terminated in 1972 — Whether entitled to pension

Civil Procedure — Limitation — Filing of separate suit — Whether parties who agreed that matter was subject of a separate suit waived limitation period to file separate suit

The plaintiff filed a notice of motion praying for a declaration that he was entitled to and ought to be considered as eligible for termination benefits including pension rights in accordance with the new terms and conditions of service as were applicable to employees, both past and present, of the local authorities. The plaintiff was formerly employed as secretary of the local council for 19 years up to 19 October 1972 and was then dismissed. He then filed a suit in 1973 complaining of his dismissal. Between the commencement of his employment to the hearing of his suit, a number of intervening events took place: (a) the Local Government Act 1952 was replaced by the Local Authorities Act 1967; (b) change of service conditions which allowed employees satisfying certain conditions to be eligible for pension benefits; (c) the Service Circular No 1 of 1975 applicable to the plaintiff's service was back-dated to 1970 except where service was terminated on disciplinary grounds or an employee had been convicted in the criminal court. It was held in the suit filed by the plaintiff that notice of one month was not fair in the circumstances but six months would be so and the plaintiff was subsequently dismissed by six months' notice. It was clear that his services were terminated by an exercise of a contractual right and not on disciplinary grounds. He further contended that the parties in the suit consented that the question of pension was a non-issue since the condition of service of the plaintiff did not provide for pension payment but the service became pensionable by reason of the service circular back-dated to 1970. The defendant submitted that the suit had included a claim for pensions and also his present claim was res judicata. Further, the defendant contended that when the 1975 circular came into force the plaintiff had been dismissed in 1972 and this action had been filed too late.

Held, dismissing the plaintiff's action with costs:

(1) From the notes of the hearing of the appeal in the suit, the parties had agreed that the question of pension was to be a subject of a separate suit. A suit must be taken to mean a claim of a party on the date and time it was filed, and when the 1973 suit was filed, it pleaded and prayed for all the benefits, arrears of allowance and all accounts due. It could not be taken to mean that the plaintiff was also claiming for pension as the possibility was only made by the 1975 circular. The Supreme Court did not mean that the plaintiff would be estopped from so claiming the pension especially after having got assurance that it was going to be a subject of a separate suit. Any other interpretation would be inconsistent with that the parties had agreed. Therefore the question of res judicata did not arise.

(2) On the proper application of Service Circular No 1 of 1975, the court would have no hesitation to say that the people who benefit in respect of pension are normally those serving officers and officers who eventually qualify for it. This would naturally exclude those officers who were no longer in service whether they had left voluntarily or were dismissed. The logical interpretation of back-dating the circular to 1970 would only cover those reaching the retiring age on that date.

(3) The cause of action arose in 1975 by virtue of the circular. The originating summons was filed in 1987 which was beyond the six-year limitation period. Although the parties had agreed that the pension was to be a subject of a separate suit, it cannot be taken that the defendant was waiving the period of limitation. It means that the plaintiff may file a separate action but would still be subject to the suit being properly brought in good time.

[*Editorial Note*: The plaintiff has appealed to the Supreme Court vide Civil Appeal No 01-21 of 1989.]

Cases referred to

1 *Quek Chek Yen* v *Majlis Daerah Kulai* [1986] 2 MLJ 290 (refd)
2 *Government of Malaysia* v *Dato Chong Kok Lim* [1973] 2 MLJ 74 (refd)
3 *Louis Dreyfus* v *Arunachala Ayya* (1931) 58 IA 381 (refd)

CKG Pillay for the plaintiff.
Teh Poh Teik for the defendant.

Cur Adv Vult

Abu Mansor J: By the plaintiff's Notice of Motion No 1015 of 1987 dated 17 October 1987, he prayed for a declaration that the plaintiff is entitled to and ought to be considered as eligible for termination benefits including pension rights in accordance with the new terms and conditions of service as are applicable to employees, both past and present, of local authorities. I heard this matter in open court on 15 March 1989 after which I reserved judgment. I now give my decision.

It can be stated with fervour that the notice of motion of the plaintiff raises only one issue. Having regard to all that had transpired and on the evidence before me, is the plaintiff entitled to and ought to be considered as eligible to termination benefits including pension from his former employer, the District Council, Kulai? A lot of the facts are undisputed before me. The plaintiff was formerly employed as the secretary of the Kulai Local Council for 19 years from 10 March 1953 to 19 October 1972. On 19 October 1972, the plaintiff was dismissed from his job. It is important to note that at the time of the plaintiff's dismissal, the plaintiff's employer was operating under the Local Government Act 1952.

As a result of his dismissal, he filed a suit in the High Court Johore Bahru No 112/73 ('1973 suit') complaining of his dismissal. In the checkered history of the case, it was heard on 23 May 1979 after six years' delay, and judgment was finally delivered on the 27 February. It was common ground that a number of intervening events had an effect on the plaintiff's position. They were:

1 The Local Government Act 1952 gave way to the Local Authorities Act 1967.
2 The Federal Government had effected a change of service condition to the effect that subject to employees

satisfying certain conditions, all employees of local authorities of ten years' service are eligible for pension benefits.

3 The relevant service circular applicable to the plaintiff's service (if not to the plaintiff) was the Service Circular No 1 of 1975.

4 The application of the said circular was back-dated to 1970 — except for two categories of employees:

(a) those employees whose services had been terminated on disciplinary grounds;

(b) those whose services had been terminated on the ground that the employees had been convicted in the criminal courts.

5 The decision of the learned judge in the 1973 case was appealed against by the plaintiff to the Supreme Court which held in the circumstances the notice to the plaintiff of one month was not fair and equitable but a notice of 6 months would be so.

6 The plaintiff was subsequently dismissed by a six-month notice.

In argument before me, the plaintiff contends that it was clear in the judgment of both the High Court judge and the decision of the Supreme Court that the plaintiff's dismissal was not on the ground of his misconduct or the ground of disciplinary proceeding against him. It cannot be denied that the plaintiff's employer in dismissing him was exercising a contractual right but the notice of one month was held to be too short. He was subsequently dismissed with proper six months' notice. I accept the position that on no account was the plaintiff's service terminated on disciplinary grounds.

The second and very material contention of the plaintiff was that it was contended by the plaintiff before the Supreme Court that it was with the consent of parties represented by counsel that the question of pension of the plaintiff was a non-issue since at the date of the plaintiff's claim, the condition of service of the plaintiff did not provide for pension payment but the service became pensionable in 1975 back-dated to 1 January 1970. The plaintiff's counsel maintains that the question of pension was a non-issue by providing the transcript of the notes of evidence of the learned judge of the Supreme Court minuting the same.

On the other hand, the present counsel for the defendant submitted that the sum total of the prayers of the plaintiff includes a claim for pensions of the plaintiff and even in the judgment of the Supreme Court in *Quek Chek Yen* v *Majlis Daerah Kulai*[1] it was stated at p 294:

> The unfortunate aspect of this case is that while the case was pending before the trial judge, the government decided to make all local council employees permanent and pensionable officers and the Government Circular No 1 of 1975 made that decision retrospective from 1 January 1970. The appellant had contended that had it not been for the termination of service he would have been made a permanent and pensionable officer. We can only say that our sympathies are with him. The circular was issued in 1975 and at that time the appellant's employment had already been lawfully terminated.

The respondent's counsel also submitted that because of the Supreme Court judgment, this matter of the plaintiff's claim is res judicata. He cited *Government of Malaysia* v *Dato Chong Kok Lim*[2] at p 76 which held that parties cannot raise for a second time in the same suit an issue that had already been determined either expressly or by necessary implication (see *Louis Dreyfus* v *Arunachala Ayya*[3]).

The contention of the parties itself raised two issues:

(i) Was the question of pension a separate non-issue?
(ii) Is the plaintiff's claim affected by res judicata?

I am clear from the notes taken by their Lordships of the Supreme Court at the hearing of the appeal before them that the parties had agreed that the question of pension, very clear to all, was to be a subject of a separate suit. A suit must be taken to mean a claim of a party on the date and time it was filed. When the 1973 suit was filed, it pleaded and prayed for all the benefits, arrears of allowance and all accounts due. It could not be taken to mean that the plaintiff was also claiming for pension as possibility of pension was made only in Circular No 1 of 1975. I therefore do not accept that 'all benefits' as pleaded in the 1973 suit include pension. As for the Supreme Court judgment having made reference to the plaintiff not being entitled to pension at that time, it must be taken that the Supreme Court did not mean that the plaintiff would be estopped from claiming, especially so after having got assurance from the plaintiff that it was going to be made a subject of a separate suit. Any other interpretation would be inconsistent with what was so agreed between the parties in this respect. The question of res judicata does not arise.

Having said that I have still to answer the substantive question of whether the plaintiff is entitled to the prayer asked for in the notice of motion. The respondent in their opposition of the plaintiff's motion advanced two other grounds. In their second ground, they say that at the time the Circular No 1 came into force in 1975, the plaintiff had already been dismissed by the termination notice in October 1972. I find there is substance in the argument of the respondent on this second ground. On the proper application of the Circular No 1 of 1975, who are the persons who would be eligible to benefit from it? I have no hesitation in saying that the people who benefit in respect of pension are normally those serving officers and officers who eventually qualify for it, either those who are entitled to exercise their optional retirement or those who retire by the force of law when reaching the age of 55 years. By the same token, I am of the view that this will naturally exclude those officers who are no longer in service whether

they had left either by voluntarily resigning or those who are dismissed from service. I am of the view also that the logical interpretation of back-dating the circular to 1970 would only cover those who reached retiring age on that date. Then the circular pertaining to pension will be implemented in their case, but not if that particular person had, for example, been dismissed.

I also found substance in the respondent's last ground that this action had been filed too late, more than six years. I am with the respondent's counsel that the cause of action arose in 1975 by virtue of that circular. This originating summons was filed in 1987. If we were to take the position when the notice of termination was given, it is even more remote in time. It was contended by the plaintiff that at the Supreme Court it was agreed that the matter of this pension can be the subject of a separate suit. I cannot take it that the respondent was waiving the period of limitation there. I take it to mean that the plaintiff may file a separate suit in respect of pensions but it will still be subject to the suit being properly brought in good time.

For the reasons I have given, I find that the plaintiff was not entitled to the declaration prayed for. The plaintiff's action is dismissed with costs to be taxed.

Application dismissed.

Solicitors: *Hassan Yunos & Co*; *Abdul Raman Saad & Associates.*

Reported by *Yap Shao Sin*

Ong Kian Loo v Hock Wah Trading Co & Ors

HIGH COURT (IPOH) — CIVIL SUIT NO 22-55-88
ABDUL MALEK J
31 OCTOBER 1989

Partnership — Assignee of share in partnership — Rights of assignee — Partnership Act 1961, s 33

The plaintiff commenced an action against the first defendant firm and several others in which he alleged that he was a partner of the first defendant firm by virtue of having taken the whole of the partnership share of his mother in the first defendant firm on 3 June 1988. However, the plaintiff's mother's name continued to remain in the business registration form. She died on 30 August 1988. The plaintiff had obtained orders granting various reliefs including the appointment of a receiver, an injunction against the defendants and an order for discovery and inspection of the partnership books and accounts. The defendants then applied for an order, inter alia, that the order obtained by the plaintiff be vacated. At the hearing of the defendants' application, counsel for the defendants contended that the plaintiff was only an assignee of the share of his mother in the partnership and that he therefore had no locus standi. It was contended for the plaintiff that the agreement by which he acquired his mother's share did not involve an assignment but a gift to the plaintiff out of love and affection.

Held, allowing the defendants' application:

(1) Although the agreement was couched in terms of a gift, it was in the nature of and was actually an assignment of the plaintiff's mother's share to the plaintiff. As such, s 33 of the Partnership Act 1961 applied and the plaintiff was not entitled to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books.

(2) It was clear from the evidence that the plaintiff's mother had actually withdrawn as a partner of the first defendant firm on 15 August 1988.

[*Editorial Note*: The plaintiff has appealed to the Supreme Court vide Civil Appeal No 02-401 of 1989.]

Legislation referred to
Partnership Act 1961, s 33

Gurbachan Singh for the plaintiff.
Chai Kai Wooi for the defendants.

Cur Adv Vult

Abdul Malek J: The defendants had applied by way of summons-in-chambers filed on 21 July 1989 upon a certificate of urgency for an order that the order made on 24 June 1989, namely:

(a) that Mr Richard Ong Guan Seng be appointed a receiver and manager to receive and manage the business of the first defendant firm until the disposal of this suit or further order of this honourable court;

(b) that the defendants do forthwith provide a true and accurate and authentic statement of profit and loss accounts from 1983 to 1989;

(c) that the plaintiff be a party to all the banking accounts of the first defendants;

(d) that all income of the said firm be deposited in the account of the first defendants held at Southern Banking Bhd, Langkap of which only the plaintiff shall be signatory;

(e) that the defendants do state the shares of profits of the said deceased and the plaintiff on the basis of 50% of the total share of profits within 14 days from the date of service of this order;

(f) that the first defendants' share and income be traced and all the movable and immovable properties, moneys and all other funds of all the defendants be subjected to such tracing;

(g) that the defendants be and are hereby restrained from selling, disposing, transferring or in any manner whatsoever dealing with all the movable and immovable properties of the defendants;

(h) that within seven days from the date of service of this order the defendants do declare and make a complete and comprehensive list of all the movable and immovable properties of, held and or owned by the defendants;